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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1491

PACIFIC LEGAL FOUNDATION AND PUBLIC LANDS COUNCIL, INC.,
Petitioners,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.,
and
THOMAS KLEPPE, SECRETARY OF THE INTERIOR,
and CURTIS BERKLUND, DIRECTOR OF THE
BUREAU OF LAND MANAGEMENT,
Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Natural Resources Defense Council, Inc., *et al.,* oppose the granting of a writ of certiorari herein.

STATEMENT OF THE CASE

The Bureau of Land Management ("BLM") is charged with managing and protecting over 171 million acres of publicly-owned lands (hereinafter "the Public Lands") within districts established by the Secretary of the Interior in the 11 western states. Approximately 150 million acres are grazed by domestic livestock under permits or licenses issued to private stock owners by these districts. *Pet. App.* at 47.

The District Court had before it evidence from numerous private and governmental sources that clearly demonstrated that livestock grazing has extensive adverse environmental effects on the Public Lands, including reductions in types and populations of fish and wildlife, accelerated erosion, deterioration in soil quality and water quantity and quality, fundamental changes in plant ecology, and the impairment of aesthetic and recreational uses.[1]

Based on this evidence, the lower court found that the Public Lands "contain valuable environmental

[1]This evidence included, for example, reports by the Council on Environmental Quality, the Congressionally-established Public Land Law Review Commission, and the President's Advisory Committee on Predator Control, in addition to documents and reports prepared by the BLM itself and the affidavits of various range experts. It is summarized in detail in Plaintiffs' Statement Of Material Facts As To Which There Is No Genuine Issue, filed pursuant to Rule 1-9(g) of the Rules of the United States District Court for the District of Columbia. A copy of this document is included in the Appendix for Plaintiffs-Appellees at 7, filed with the Court of Appeals. No response thereto was filed in the District Court by any party, and, under the provisions of Local Rule 1-9(g), the facts stated therein were deemed admitted in their entirety.

and recreational resources"; that "the grazing permit program produces significant impacts on individual locales"; and that "serious deterioration of BLM lands is taking or has taken place." *Pet. App.* at 47, 53, 67. Ultimately, the court concluded that "in a substantial and practical sense there is a serious threat of injury to the public lands which lends urgency to plaintiffs' claims." *Pet. App.* at 58.

The District Court determined that the federal defendants had failed to comply with Section 102(2)(C) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* It therefore required them to prepare environmental impact statements "which discuss in detail the environmental effects of the proposed livestock grazing, and alternatives thereto, in specific areas of the public lands which are or will be licensed for such use . . . ." *Pet. App.* at 72. It further required that plaintiffs and the federal defendants confer to determine if an agreement could be reached upon a reasonable schedule for the preparation of these impact statements. *Pet. App.* at 72, 73.

In fact, the federal defendants thereafter entered into a settlement agreement with the plaintiffs, stipulated to a Final Judgment in the matter, and moved to dismiss their own appeal from the Judgment of December 30, 1974. Under the agreement, the BLM determined to prepare impact statements for specific grazing areas of the Public Lands under a 13-year schedule. The District Court approved the settlement

agreement and entered the Final Judgment, to which the federal defendants had stipulated.[2]

The appeal which is the subject of this petition, on the other hand, was filed by parties who are not directly affected by the decision of the District Court. The impact statements required by the stipulated Final Judgment will be prepared not by petitioners but by the federal defendants. In the interim, there is no injunction against the issuance or renewal of grazing permits held by petitioners' members, and the Final Judgment (or the earlier Judgment of December 30, 1974) will in itself effect no suspension or cancellation of their grazing privileges.

At the time the District Court entered summary judgment for plaintiffs, on December 30, 1974, the BLM had failed in the five years of NEPA's existence, to prepare and file any final environmental impact statement relating to domestic livestock grazing on the Public Lands—despite the fact that the grazing districts continued to issue and renew grazing permits and undertake grazing "supportive measures" during that period.

As the District Court noted, the BLM had been working for some time on preliminary drafts of a

[2]Contrary to the implication of petitioners (*Pet. for Cert.* at 15, 16), the District Court did not unilaterally impose a requirement upon the BLM that impact statements be prepared on 212 areas of the Public Lands. It held that the format and number of such statements were to be left initially to the discretion of the BLM. *Pet. App.* at 70. Thereafter, the BLM determined under the settlement agreement to prepare impact statements on these particular areas according to an agreed schedule. The Final Judgment (*Pet. App.* at 76-83) follows, with minor exceptions, the settlement agreement verbatim.

Bureau-wide "programmatic" impact statement on livestock grazing. *Pet. App.* at 50. However, that impact statement discussed the impacts of grazing only in generic terms and did not purport to discuss specific conditions of the Public Lands in any particular grazing district, or the actual environmental effects of grazing within any particular district or any of the alternatives available to the districts in decision-making concerning the issuance or renewal of grazing permits. On this basis, the District Court held that the programmatic statement would not suffice, standing alone, to meet the obligations of the BLM under NEPA. *Pet. App.* at 64, 66, 67.

It is significant that, in contrast to the arguments of petitioners herein, the federal defendants did not contend that the districts' issuance of grazing permits was exempt from NEPA. Nor did they contend that the programmatic statement would alone suffice to meet their NEPA obligations. Instead, they stated that, when completed, it would "serve as the foundation for subsequent environmental analyses and for supplemental impact statements which may be prepared for smaller land areas or on an individual basis for specific grazing management actions." *Pet. App.* at 50.[3]

Indeed, the settlement agreement and the stipulated Final Judgment herein are, in a sense, a precise, definitive confirmation of the Bureau's intention, as

[3]The District Court was here quoting from the Federal Defendants' Statement of Material Facts as to Which There Is No Genuine Issue ¶ 13, included in the Appendix for Intervenors at F, filed in the Court of Appeals.

described above. In a news release issued July 16, 1975 by the Department of the Interior, BLM Director Curtis Berklund "emphasized that the preparation of each environmental statement in support of the livestock grazing program will be a companion effort with the Bureau's planning system" and that the settlement agreement accepted by the Court "gives our range management program a new sense of direction and provides a time frame in which environmental statements will be completed." He further stated that "[w]e are not going to simply conform to the letter of the law, but utilize the information and analysis to achieve full benefit from our work."[4]

REASONS FOR DENYING THE WRIT

1. Respondents submit that petitioners have failed to demonstrate that they are aggrieved in any respect by the decision of the District Court.[5] No injunction was issued by the District Court in this case, pending the preparation of the impact statements required. Accordingly, petitioners' interests will be affected by this process only if these environmental impact statements establish that the adverse environmental effects

[4]A copy of this document is included in the Appendix for Plaintiffs-Appellees at 100, filed with the Court of Appeals.

[5]Ordinarily, only a party who is "aggrieved" by the judgment or order in the lower court is entitled to seek appellate review. 9 Moore, *Federal Practice* § 203.06 (2d ed. 1974). Accordingly, the courts have dismissed appeals filed by parties lacking any legally-cognizable interest that is injured or adversely affected by the trial court's judgment. *See, e.g., Mayer v. National Missile & Electronics*, 326 F.2d 401 (9th Cir. 1964); *De Korwin v. First National Bank*, 235 F.2d 156 (7th Cir. 1956); *Spriggs v. Stone*, 174 F.2d 671 (D.C. Cir. 1949).

of livestock grazing in particular areas require its suspension or alteration there. However, petitioners clearly have no legal right to be "protected" against this eventuality or the preparation of the impact statements in the first instance. *Cf. Milgram v. Loew's*, 192 F.2d 579 (3d Cir. 1959) (intervenors not legally aggrieved by lower court's decree).[6]

The parties who *were* affected by the District Court's Judgment of December 30, 1974—the federal defendants—have reached an agreed settlement of the case and have integrated the impact statements into their planning system. Even if it were assumed *arguendo* that the BLM was not required by law to institute the specific procedures to which it has agreed, NEPA clearly grants it *authority* to do so. *See* Executive order 11514, § 1, 35 Fed. Reg. 4247 (1970); *cf. Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

2. Although petitioners assert that the results of the lower court's decision will be "the repeal of the Taylor Grazing Act" *(Pet. for Cert.* at 12), they can point to no specific respect in which this application of NEPA conflicts with any particular responsibilities

[6]To fill this void, petitioners have largely resorted to rhetoric and innuendo in their petition. After impugning the motives of these respondents and the BLM, they assert that "[t]he decision gives those who would drive the grazing permit holders from the 'public' lands the tool for doing so." *Pet. for Cert.* at 11. None of those assertions are substantiated by anything in the record. Moreover, the right of respondents to challenge the adequacy of later impact statements is a legal right which exists apart from the settlement agreement and Final Judgment. Petitioners' speculation that a spate of future litigation will occur is unwarranted and hardly supports any claim of injury to petitioners, in any event.

imposed by the Taylor Grazing Act.[7] Petitioners' argument here appears to be based primarily on their notion that the Taylor Grazing Act and the regulations adopted by the BLM thereunder amount to the "functional equivalent" of an environmental impact statement under NEPA, and that the BLM therefore possesses a special exemption from otherwise complying with NEPA.

Their contention has never been shared by the BLM, and petitioners are again unable to specify any distinct, comprehensive environmental assessment required under the Taylor Grazing Act or the BLM's regulations, with safeguards akin to those required by NEPA, which could serve as the "functional equivalent" of an impact statement.

The District Court carefully reviewed the BLM's existing procedures. It concluded that the Taylor Grazing Act is "not purely an environmental act, but was designed both to stop injury to the public domain by unregulated grazing and to promote stabilization of the livestock industry" *(Pet. App.* at 52),[8] and that the agency's procedures did not constitute the functional equivalent of an impact statement. *(Pet. App.* at 66).[9]

[7]For this reason, among others, the District Court determined that petitioners' reliance on the decision in *Natural Resources Defense Council v. Tennessee Valley Authority*, 367 F. Supp. 122 (E.D. Tenn. 1973), *aff'd*, 502 F.2d 852 (6th Cir. 1974) was misplaced. *See Pet. App.* at 61-63, 65, 66.

[8]*See Hatahley v. United States*, 351 U.S. 173, 177 (1956); *La Rue v. Udall*, 324 F.2d 428, 430 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 907 (1964).

[9]The BLM has itself acknowledged that the Federal Range Code for Grazing Districts, 43 C.F.R. §§ 4110.0-2 *et seq.*, does not provide adequate environmental protection for the Public Lands. Memorandum, from Acting Assistant Director, BLM, to the Solicitor, "Implementation of National Environmental Policy Act" (September 1, 1970) (included in Appendix for Plaintiffs-Appellees at 47, filed with the Court of Appeals). In addition, the BLM stated that its planning system was never intended to serve as a substitute for impact statements. Pl. Exh. 2 to Supp. Aff. of John Roger Beers (included in Appendix for Plaintiffs-Appellees at 96, filed with the Court of Appeals). Finally, the District Court described in its opinion the BLM's "slow progress in implementing a thorough management planning system which would assist in protecting the environment." *Pet. App.* at 58.

NEPA itself contains no exemption of the sort promoted by petitioners. Section 102 directs that "to the fullest extent possible . . . *all* agencies of the federal government" shall follow the procedures set forth therein, including the preparation of environmental impact statements. (emphasis added). *See Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1112, (1971).[10]

The issue of whether any federal agency is exempt from NEPA has been largely confined to whether the Environmental Protection Agency ("EPA") is exempt in any respect. However, most courts which have considered the matter have expressly declined to hold that even EPA has a "blanket" exemption from NEPA. *See, e.g., Environmental Defense Fund v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1974); *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 384 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). These few cases, involving only EPA, hardly

[10]In *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972), the court held that no exemption from NEPA was afforded the Interior Department merely because independent statutory provisions required that environmental considerations be taken into account in the approval of a lease of Indian lands. *See also SIPI v. AEC*, 481 F.2d 1079, 1091 (1973) (proposed "environmental survey" by the agency would not suffice in lieu of an environmental impact statement in accordance with the procedures in NEPA).

support the expansive exemption which petitioners seek to thrust upon the BLM.[11]

3. Finally, petitioners argue that the lower court's decision constitutes "judicial intervention" in the reasonable exercise of agency discretion under NEPA. *Pet. for Cert.* at 16. The irony in this argument is that petitioners themselves seek "judicial intervention" in the agency's exercise of its discretion in reaching an agreed settlement of this matter.

Petitioners assert that the decision of the District Court "blocked" the BLM's intentions to prepare a broad, program statement, followed by statements on individual actions. *Pet. for Cert.* at 18. What they ignore is that this precise course of action is in effect confirmed by the decision and settlement agreement in this case, as discussed above.

In all events, the District Court properly concluded that the Bureau-wide programmatic statement would not suffice, standing alone, to provide the assessment of the individualized, "on-the-ground" impact of the issuance of grazing permits on local environments, as required by NEPA. This conclusion was reached after a careful review of the different functions performed by site-specific statements and the proposed programmatic statement. *Pet. App.* at 59-70. *See generally SIPI v. AEC*, 481 F.2d 1079, 1091-1093 (D.C. Cir. 1973).[12]

[11]Nor does this Court's decision in *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289 (1975) offer any support for petitioners' arguments. In *SCRAP*, the Court did not fashion any exemption from NEPA's impact statement requirement, as petitioners imply. *Pet. for Cert.* at 19. An impact statement had been prepared by the responsible agency in that case, and this Court held that the timing of the preparation of the impact statement was correct and that the statement was adequate in view of the limited nature of the agency's proceedings. No similar issues are present in this case.

CONCLUSION

For the foregoing reasons, we urge that the petition for writ of certiorari be denied.

May 14, 1976

Respectfully submitted,

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[12]The issues raised in *Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975), *cert. granted sub nom. Kleppe v. Sierra Club*, 44 U.S.L.W. 3397 (U.S. Jan. 13, 1976) (No. 75-552), are not analogous to those initially determined in the District Court herein. In the former case, the primary issue dealt with in the opinion of the Court of Appeals was whether a series of federal actions, involving different agencies, constituted a "program" which required an impact statement. The court in that case expressly distinguished the result in the present case. 514 F.2d at 870, n.21. In addition, the authorities cited on page 18 of the petition herein considered whether the agency had improperly segmented the action or program, as described in an impact statement. No such issue is present herein.